

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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RENE F. FERNANDEZ,

Case No. 2:12-cv-01810-MMD-GWF

Petitioner,

ORDER

v.

JAMES GREG COX, et al.,

Respondent.

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner.

Petitioner has filed a motion to proceed *in forma pauperis* (dkt. no. 5). Based on the information about petitioner's financial status, the Court finds that the motion to proceed *in forma pauperis* should be granted.

A petitioner must first present his grounds for relief to a state court before a federal court may review the merits of the issues he raises. To exhaust a claim, petitioner must have "fairly presented" that specific claim to the Supreme Court of Nevada. See *Picard v. Conner*, 404 U.S. 270, 275-76 (1971); *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1344 (9th Cir. 1984). A federal court cannot hear a mixed petition that contains both exhausted and unexhausted claims for habeas corpus relief. *Rose v. Lundy*, 455 U.S. 509, 521-22 (1982); *Szeto v. Rusen*, 709 F.2d 1340, 1341 (9th Cir. 1983). If a single one of the claims in the petition is unexhausted, the court is obliged to dismiss the petition for lack of exhaustion.

1 Upon reviewing the petition in this case, the Court concludes that petitioner's
2 claims are unexhausted. Petitioner admits that he has filed a petition for a writ of
3 habeas corpus in state court on August 10, 2012 (dkt. no. 1 at 1). Because petitioner
4 has not exhausted his grounds for relief in state court, this action shall be dismissed.

5 In order to proceed with any appeal, petitioner must receive a certificate of
6 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v.*
7 *Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); see also *United States v. Mikels*, 236
8 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make "a substantial
9 showing of the denial of a constitutional right" to warrant a certificate of appealability.
10 *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The
11 petitioner must demonstrate that reasonable jurists would find the district court's
12 assessment of the constitutional claims debatable or wrong." *Id.* (quoting *Slack*, 529
13 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of
14 demonstrating that the issues are debatable among jurists of reason; that a court could
15 resolve the issues differently; or that the questions are adequate to deserve
16 encouragement to proceed further. *Id.*

17 Pursuant to the December 1, 2009, amendment to Rule 11 of the Rules
18 Governing Section 2254 and 2255 Cases, district courts are required to rule on the
19 certificate of appealability in the order disposing of a proceeding adversely to the
20 petitioner or movant, rather than waiting for a notice of appeal and request for certificate
21 of appealability to be filed. Rule 11(a). This Court has considered the issues raised by
22 petitioner, with respect to whether they satisfy the standard for issuance of a certificate
23 of appealability, and determines that none meet that standard. The Court will therefore
24 deny petitioner a certificate of appealability.


25 IT IS THEREFORE ORDERED that the application to proceed *in forma*
26 *pauperis* (dkt. no. 5) is GRANTED. The Clerk SHALL FILE the petition for a writ of
27 habeas corpus.

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1 IT IS FURTHER ORDERED that this action is DISMISSED WITHOUT
2 PREJUDICE for failure to exhaust state court remedies. If and when petitioner
3 exhausts his state court remedies, he may file a new habeas petition in a new action.
4 The Clerk shall enter judgment accordingly.

5 IT IS FURTHER ORDERED that petitioner is DENIED a certificate of
6 appealability.

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8 DATED THIS 27th day of November 2012.

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12 MIRANDA M. DU
13 UNITED STATES DISTRICT JUDGE
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